

THE STATE OF NEW HAMPSHIRE

ATTORNEY GENERAL
GREGORY H. SMITH

DEPUTY ATTORNEY GENERAL
DEBORAH J. COOPER

ATTORNEYS
LORETTA S. PLATT
DANIEL J. MULLEN
JAMES D. CAHILL, III
RONALD F. RODGERS
JEFFREY R. HOWARD
G. DANA BISBEE
GREGORY W. SWOPE
PETER T. FOLEY
STEVEN M. HOURAN
EVE H. OYER
BRUCE E. MOHL
DOUGLAS L. PATCH
JOHN A. MALMBERG



THE ATTORNEY GENERAL
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

ASSISTANT ATTORNEYS GENERAL
JOHN T. PAPPAS
E. TUPPER KINDER
JAMES E. TOWNSEND
ANNE R. CLARKE
MARC R. SCHEER
DONALD J. PERRAULT
JEFFREY R. COHEN
PAUL W. HODES
MARTIN R. JENKINS
PETER W. MOSSEAU
BETSY S. WESTGATE
MARTHA V. GORDON
PETER C. SCOTT
EDWARD L. CROSS, JR.
MICHAEL A. PIGNATELLI
BRIAN T. TUCKER
PAUL BARBADORO

June 7, 1983

Mr. John A. King, Director
Department of Probation
PO Box 769
Concord, New Hampshire 03301

Dear Mr. King:

By letter dated May 9, 1983, you requested answers to the following questions:

1. May a probation officer include information obtained from a sealed juvenile record in a presentence report provided to the court?
2. May a sealed juvenile record be placed in the same container as other records when turned over to Archives?

It is our opinion that information from a sealed juvenile record may be used in a presentence report provided to the court and that the sealed record may be placed in the same container as other records, provided the confidentiality of the record is protected.

RSA 169-B:35 provides for limited access to "all records pertaining to cases of delinquency" and further states:

"Once a delinquent reaches 19 years of age, all court and individual institutional records including police records shall be sealed and placed in an inactive file."

Sealing a record is not the same as annulling or expunging it. As the Massachusetts Supreme Judicial Court stated in



Legal Counsel (603) 271-3658
Charitable Trusts (603) 271-3591
Antitrust Section (603) 271-3640
(603) 271-3685

Consumer Protection (603) 271-3641
Criminal Justice (603) 271-3671
Eminent Domain (603) 271-3675
Environmental Protection (603) 271-3679
Unemployment Compensation (603) 271-3712

Police Commissioner of Boston v. Municipal Court, 374 N.E.2d 272 (1978), the term "sealing" "refers to those steps taken to segregate certain records from the generality of records and to insure their confidentiality. ..." Sealing does not mean that a record is removed or destroyed so that no trace of the information contained in the record remains; rather, sealing is a means of preserving the record but limiting the access to it. As the Massachusetts court further stated:

"Sealing, in preference to expungement, of records usually has been specified where interests in confidentiality have been recognized. Police, as well as courts, have been given special consideration with regard to access to sealed information." 374 N.E.2d at 278.

RSA 651:5 describes the procedures to be followed when a person seeks to have his record "annulled." Under New Hampshire law, the annulling of a criminal record must be regarded as a more comprehensive procedure than the sealing of one. When a record is annulled, "the applicant shall be treated in all respects as if he had never been convicted and sentenced. ..." RSA 651:5, V. To annul a conviction is to make it void or of no effect. Black's Law Dictionary 117 (4th Ed. 1968). Even in the case of an annulment, however, the annulled conviction may be considered by a court in determining the sentence to be imposed for a subsequent conviction. RSA 651:5, V; Doe v. State, 114 N.H. 714, 718 (1974); 2 New Hamp. Practice, Criminal §1032.

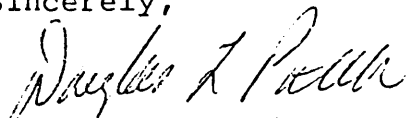
It should further be noted that statutes prohibiting or restricting the use of a juvenile court record in other courts have generally been construed to allow the use of a juvenile court record for sentencing purposes. Annot., 64 A.L.R.3d 1291, 1294 (1975). In State v. Ferbert, 113 N.H. 235 (1973), the court rejected a challenge to the use of a probation report by the trial court prior to sentencing. Although the report contained references to the defendant's record while a juvenile, the court found no abuse of discretion by the trial court. Citing Gregg v. United States, 394 U.S. 489 (1969), the New Hampshire Supreme Court noted that there are no formal limitations on the contents of presentence reports and that their purpose is to provide the judge with enough information to impose a sentence suited to the character of the defendant and his potential for rehabilitation. 113 N.H. at 237, 238.

It is therefore our opinion that the information contained in a sealed juvenile record may be included in a presentence report provided to the court.

With regard to the storage of sealed juvenile records, it is our opinion that the only requirement for the method by which the Division of Archives stores sealed juvenile records is that the confidentiality of the records be protected. However, if the storage of sealed records with other records means that the sealed records would be accessible to the general public or to persons other than police and court personnel, it is our opinion that such a procedure would violate the provisions of RSA 169-B:35.

I trust this has been responsive to your questions. Please let me know if you have any further questions.

Sincerely,


Douglas L. Patch
Assistant Attorney General
Division of Legal Counsel

DLP:ab
#83-70-I